Supreme Court, U.S.
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NO. 87-1783

in the

Supreme Court

of the

United States

OCTOBER TERM, 1987

WILLIAM A. BRACKENRIDGE,

Appellant,

vs.

AMETEK, INC. and
BARING INDUSTRIES, INC.,

Appellees.

On Appeal from
The Supreme Court of Florida

BARING INDUSTRIES, INC.'S MOTION TO DISMISS APPEAL

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QUESTION PRESENTED

Whether the Supreme Court lacks jurisdiction to entertain this appeal.

LIST OF ALL PARTIES

The proper appellees are AMETEK, INC. ("AMETEK") and BARING INDUSTRIES, INC. ("BARING"). The appellant is WILLIAM A. BRACKENRIDGE.

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STATEMENT OF THE CASE

In this products liability action, Appellant alleged that he was seriously injured when his right arm was severed in a commercial laundry machine, the TROY MINUTEMART EXTRACTOR (the "extractor"), manufactured by AMETEK and distributed by BARING. The extractor was manufactured and delivered on or about August, 1967. In December, 1982, over fifteen years after delivery of the extractor, BRACKENRIDGE suffered the alleged injury. This lawsuit was commenced in December, 1984, more than seventeen years after the manufacture and delivery of the allegedly defective extractor. BARING asserted as an affirmative defense that BRACKENRIDGE's claim was time barred by the applicable statute of limitations. That statute, Section 95.032(2), more appropriately known as the statute of repose, absolutely bars products liability actions instituted more than twelve years after delivery of the allegedly defective product.

In 1985, during the pendency of this lawsuit, the Supreme Court of Florida, in *Pullum v. Cincinnati, Inc.*, 476 So.2d 657 (Fla. 1985), *appeal dismissed*, 475 U.S. 1114 (1986) upheld the constitutionality of Section 95.031(2), the statute of repose barring this claim. In reaching this conclusion, the Florida Supreme Court "receded" from its previous decision in *Battilla v. Allis Chalmers Manufacturing Co.*, 392 So.2d 874 (Fla. 1980), and found that Section 95.031(2) does not unconstitutionally deny access to courts under Article I, Section 21 of the Florida Constitution. The Florida Supreme Court determined furthermore that the statute of repose constituted a proper and permissible exercise of a legislative prerogative:

> The legislature, in enacting this statute of repose, reasonably decided that perpetual liability places an undue burden on manufacturers, and it decided that twelve years from the date of sale is a reasonable time for exposure to liability for manufacturing of a product. Justice McDonald, in maintaining the constitutional validity of section 95.031(2) in his dissenting opinion in *Batilla*, correctly reasoned as follows:
>
> * * * *
>
> I perceive a rational and legitimate basis for the legislature to take this action, particularly in view of the relatively recent developments in expanding the liability of manufacturers.

Pullum at 659-60.

The Third District Court of Appeal in *Brackenridge v. Ametek, Inc.*, 503 So.2d 363 (Fla. 3d DCA 1987), and the Supreme Court of Florida in *Brackenridge v. Ametek, Inc.*, 517 So.2d 667 (Fla. 1987) held that Appellant's cause of action in this case was barred by the statute of repose. The Florida Supreme Court, affirming the trial court's grant of summary judgment and approving the District Court's decision, rejected Appellant's contention that applying *Pullum* to his pending action deprived him of a property right.

REASONS WHY APPEAL SHOULD BE DISMISSED

I.

BECAUSE APPELLANT HAS NO PROPERTY RIGHT IN HIS TORT CLAIM, NO FEDERAL DUE PROCESS QUESTION IS BEFORE THIS COURT AS A BASIS FOR JURISDICTION.

It is axiomatic that in order to be entitled to the procedural protections afforded by the due process clause of the Fourteenth Amendment, the complaining party must suffer from the deprivation of a liberty or property interest. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Bigby v. City of Chicago*, 766 F.2d 1053 (7th Cir. 1985); *Beckham v. Harris*, 756 F.2d 1032 (4th Cir. 1985). In *Roth*, this Court stated that "to have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it—he must, instead, have a legitimate claim of entitlement to it". *Roth*, 408 U.S. at 577. Property interests are not created by the Constitution, but, rather are created and defined by existing rules or understandings that stem from an independent source, such as state law. *Roth*, 408 U.S. at 577. *See also, Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985); *Parratt v. Taylor*, 451 U.S. 527 (1981).

The sufficiency of a claim of entitlement to a benefit must be decided by reference to state law, *Bishop v. Wood*, 426 U.S. 341, 344 (1976) as evidenced by state statutes, local ordinances, rules, or mutually explicit understandings that support the claim. See *Perry v.*

Sinderman, 408 U.S. 593 (1972). The constitutional safeguards of the due process clause come into play only when such a property right clearly exists. *Roth*, 408 U.S. at 577.

In *Brackenridge*, 517 So.2d at 669, the Supreme Court of Florida determined that Appellant neither acquired nor was deprived of any property right. Because, therefore, the due process clause is not implicated here, Appellant has failed to invoke the jurisdiction of this Court.

II.

THIS COURT LACKS JURISDICTION BECAUSE APPELLANT HAS FAILED TO PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Appellant asserts as his basis for this appeal that retroactive application of *Pullum* to his claim unconstitutionally divested him of a protected property right in violation of the due process clause of Article XIV, Section 1 of the United States Constitution. *See* Appellant's Jurisdictional Statement at 7-8. As the Florida Supreme Court correctly determined in *Brackenridge*, 517 So.2d at 669, and according to well-settled principles of law, Appellant has no property right in his claim.

It is fundamental that no person has a property right or vested interest in any rule of common law entitling him to have such a rule of law remain unchanged for his benefit. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978); *Arizona Copper Co. v. Hammer*, 250 U.S. 400 (1919). *See also Ducharme*

v. Merrill-National Laboratories, 574 F.2d 1307 (5th Cir.), *cert. denied*, 439 U.S. 1002 (1978). ("It is well-settled that a plaintiff has no vested right in any tort claim for damages under state law").

As a corollary to his proposition, it is firmly established that "the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object". *Silver v. Silver*, 280 U.S. 117, 122 (1929).

Appellant mistakenly relies on *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) to support his assertion that his cause of action is a constitutionally protected property right. Although this Court noted in *Logan* that "a cause of action is a species of property . . ." *Id.*, at 428, it also reaffirmed the constitutional prerogative of the state to create new or to eliminate existing causes of action.

> Of course, the State remains free to create substantive defenses or immunities for use in adjudication—or to eliminate its statutorily created causes of action altogether—just as it can amend or terminate its welfare or employment programs. The Court held as much in *Martinez v. California*, 444 U.S. 277, 100 S.Ct. 533, 62 L.Ed.2d 481 (1980), where it upheld a California statute granting officials immunity from certain types of state tort claims. We acknowledged that the grant of immunity arguably did deprive the plaintiffs

> of a protected property interest. But they were not thereby deprived of property without due process, just as a welfare recipient is not deprived of due process when the legislature adjusts benefit levels.

Id. at 432-33.

Appellant's reliance on *Martinez v. State of California*, 444 U.S. 277 (1980) is equally misplaced. In *Martinez*, this Court determined that even if the plaintiff's cause of action for wrongful death created by the State of California was a "species" of property, the abolition of that cause of action through the application of the California immunity statute did not violate due process.

> Nor can the statute be characterized as an invalid deprivation of property. Arguably, the cause of action for wrongful death that the State has created is a species of "property" protected by the Due Process Clause. On that hypothesis, the immunity statute could be viewed as depriving the plaintiffs of that property interest insofar as they seek to assert a claim against parole officials. But even if one characterizes the immunity defense as a statutory deprivation, it would remain true that the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational.
> (footnote omitted).

Further misconceived is Appellant's reliance on *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Because *Chevron* is not a case of constitutional dimension, it cannot serve as a basis for arguing a substantial federal question. Although the issue presented in *Chevron* was whether the state statute of limitations should be retroactively applied to bar plaintiff's suit, the *Chevron* Court bottomed its decision not upon federal constitutional grounds, but upon a three-part balancing test.

The balancing test delineated in *Chevron* calls for the weighing of competing policy considerations in determining whether a rule should be given retroactive application.

Interestingly, two Florida Federal District Courts applying the *Chevron* test to facts analogous to the ones presented here have determined that retroactive application of *Pullum* is proper under *Chevron* and constitutionally permissible. *See Lamb v. Volkswagenwerk Aktiergesellschaft*, 631 F.Supp. 1144 (S.D. Fla. 1986); *Eddings v. Volkswagenwerk, A.G.*, 635 F.Supp. 45 (N.D. Fla. 1986). The courts in both *Lamb* and *Eddings* found that the *Chevron* test only applies to the retroactive application of a federal decision involving federal law, and not in cases, such as this, involving the retroactivity of a state law or decision. Both courts agreed this issue is purely one of state law. *See Lamb*, at 1151-52; *Eddings*, at 48. Both courts furthermore concluded that the plaintiffs had no property rights in their causes of action and that their federal constitutional rights were in no way abridged through the retroactive application of the statute of repose. *Lamb* at 1152; *Eddings* at 48.

Like the plaintiffs in *Lamb* and *Eddings*, Appellant in this cause had no property right in his claim and was, consequently, not subjected to any deprivation of due process as a result of the retroactive application of *Pullum*. Appellant has failed to present a substantial federal question. Accordingly, this Court lacks jurisdiction to entertain this appeal.

III

ADOPTION OF ARGUMENTS

Appellee adopts the arguments of co-appellee, AMETEK, as if fully set forth herein.

CONCLUSION

Because Appellant had no property right in his cause of action, no due process considerations are implicated and no substantial federal question is presented here. Accordingly, this appeal should be dismissed.

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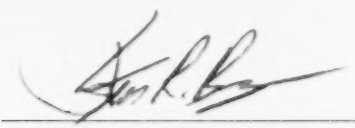
By 
Steven R. Berger

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 23rd day of June, 1988 to George C. Vogelsang, Esquire, The Vogelsang Law Firm, Attorneys for Brackenridge, 6701 Sunset Drive, Suite 102A, Miami, Florida 33143; David C. Pollack, Esquire, Ricardo Torres, Jr., Esquire, Stroock & Stroock & Levan, Attorneys for Ametek, Inc., 3300 Southeast Financial Center, 200 South Biscayne Boulevard, Miami, Florida 33131-2385; and Linda Koenigsberg, Esquire, Law Offices of James O. Nelson, Attorneys for Baring, One Biscayne Tower, Suite 2628, Two South Biscayne Boulevard, Miami, Florida 33131.

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